In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-583

NEVILLE M. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In November 1970, petitioner, a police court judge, was convicted after pleading *nolo contendere* to a three count information of willfully failing to file his federal income tax returns for 1964, 1965 and 1966, in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to pay fines totaling $1,500 and to concurrent terms of six months imprisonment on each count. Execution of the sentence of imprisonment was suspended and petitioner was placed on probation for one year upon the conditions,

inter alia, that he conduct himself as a law-abiding citizen and report to the probation officer on the first working day of each month (R. 22a-24a;[1] Pet. App. 7a).

In May 1971, the probation officer reported to the district court (R. 31a) that petitioner had not timely filed his 1970 federal income tax return or obtained an extension of time for filing the return, though petitioner had represented that he had timely requested and received an extension. Petitioner responded to the court that he had filed a request for an extension on April 14, 1971, and that he had subsequently filed his 1970 income tax return (R. 9a-10a). The probation officer investigated these claims and reported that the extension request was incomplete when filed and thus had been returned to petitioner on April 18 with instructions to return it within 10 days, but that the completed form was not returned as required and no extension had been granted as of that date (May 24, 1971). The officer also indicated that petitioner's return was filed on May 22, 1971, and that four of the five monthly probation reports required since sentencing, which he had been permitted to submit by mail, were either filed late or not filed at all (R. 19a-21a).

On May 26, 1971, the district court, after a hearing at which petitioner was present and represented by counsel (R. 34a-39a), revoked petitioner's probation on the ground that petitioner had not timely filed a federal income tax return for 1970 and had not ob-

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[1] "R." references are to the record appendix filed in the court of appeals.

tained an extension for filing that return beyond the statutory due date of April 15, 1971 (R. 8a-9a, 20a-21a, 31a-32a, 38a). The court of appeals affirmed *per curiam* on June 18, 1971 (Pet. App. 7a-10a), and direct review of that decision has not been sought.

On June 23, 1971, petitioner filed in the district court a motion to reconsider the order revoking probation and to reinstate probation, urging as a reason that on May 28, 1971, subsequent to the original hearing, the Internal Revenue Service had granted him an extension to June 15, 1971, within which to file his 1970 return (R. 27a-29a). The district court again conducted a hearing, attended by petitioner and his counsel, and denied the motion (R. 30a). The court of appeals affirmed on September 28, 1971 (Pet. App. 13a).

1. Contrary to petitioner's assertion (Pet. 10-22), there is no issue now whether there was sufficient evidence supporting the revocation of his probation. That issue was determined by the first judgment of the court of appeals, on June 18, 1971; petitioner did not file a timely petition for certiorari to review that judgment nor did he make any effort to procure an extension of time for such a petition. Furthermore, in our view the record provides adequate evidence to show that the district court did not abuse his discretion either in revoking petitioner's probation or in refusing to reinstate it. These matters necessarily turn on factual issues and do not warrant review by this Court.

Since probation and the revocation thereof are discretionary matters, the court below correctly framed

the issue (Pet. App. 9a) as " 'simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.' *Burns* v. *United States*, 287 U.S. 216, 220 (1932)."[2] Petitioner concededly failed to file his 1970 income tax return on April 15, 1971, and the application for an extension, which he mailed on April 14, 1971, was incomplete. As the information which was omitted is required not only by the form, but also by Section 1.6081-1(b)(2)(ii) of Treasury Regulations on Income Tax (1954 Code), the district court was correct in its observation (R. 38a) that petitioner could not expect to receive an extension on the basis of that application. Indeed, the Internal Revenue Service returned the application on April 18, 1971, with instructions that it be completed and returned within 10 days. Petitioner did not, however, refile the application until May 22, 1971, on which date he also filed what purported to be a 1970 federal tax return on a 1969 form. Meanwhile, on May 14, 1971, the probation officer inquired of petitioner whether he had

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[2] The quoted phrase appears at 287 U.S. at 222. See also *Escoe* v. *Zerbst*, 295 U.S. 490; *United States* v. *Nagelberg*, 413 F. 2d 708 (C.A. 2), certiorari denied, 396 U.S. 1010; *United States* v. *D'Amato*, 429 F. 2d 1284 (C.A. 3); *United States* v. *Cates*, 402 F. 2d 473 (C.A. 4); *United States* v. *Clanton*, 419 F. 2d 1304 (C.A. 5); *Whitehead* v. *United States*, 155 F. 2d 460 (C.A. 6), certiorari denied, 329 U.S. 747; *United States* v. *Weber*, 437 F. 2d 1218 (C.A. 7), certiorari denied, 402 U.S. 1008; *Douglas* v. *Sigler*, 386 F. 2d 684 (C.A. 8); *Longknife* v. *United States*, 381 F. 2d 17 (C.A. 9), certiorari denied, 390 U.S. 926; *Yates* v. *United States*, 308 F. 2d 737 (C.A. 10).

requested an extension for his federal tax return and was told by petitioner that an extension had been granted, that it would expire in three days, and that the form was at petitioner's home (R. 8a, 20a, 32a). When the district court received the probation officer's report that no record of a return or of an extension had been found, the court scheduled a probation revocation hearing for May 26, 1971. At that hearing, petitioner's only explanation of his actions, besides his protestation that he intended to comply with the law, was that in talking to the probation officer he did not have the extension application form in hand, and that when he found that document he sent it to his attorneys (R. 37a).

In these circumstances, it was no abuse of discretion for the district court to revoke probation following the hearing on May 26, 1971. At that time petitioner had neither filed a timely return for 1970 nor obtained an extension. Thus, as the court below observed (Pet. App. 9a), he was then "committing acts similar to those which brought about his previous conviction." Moreover, petitioner had failed to submit the monthly probation reports on the required dates, and had made untruthful statements to the probation officer concerning the extension application, all of which indicated a disregard of the probation conditions and supported revoking the probation.

Nor was the district court obliged to reinstate probation when subsequently the Internal Revenue Service granted petitioner an extension. That extension may or may not relieve petitioner of the normal pen-

alties for late filing.[3] More important, petitioner had failed to comply promptly with the federal tax laws, which in similar circumstances had resulted in his earlier criminal acts and conviction, and had finally completed the extension application and his 1970 federal return only following the prodding of the inquiries and report by the probation officer. The district court did not abuse its discretion by holding that the granting of the extension was not sufficient to support reinstating probation.[4]

2. Petitioner's other contentions are without substance. While petitioner asserts (Pet. 22-24) that the conditions of his probation were overly vague, he did not object at the time the conditions were imposed, and in fact signed a statement to the effect that he had read and fully understood and would abide by them (R. 24a). This issue was raised for the first time in the court of appeals, on petitioner's first ap-

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[3] Petitioner's application (R. 11a) stated he needed an extension because "I have been unable to secure information on deductions expenses." If, upon audit, the Internal Revenue Service should find this reason not supportable under the circumstances, petitioner could be required to establish reasonable cause for failure to pay on April 15, 1971, in order to avoid penalties. See Technical Information Release No. 1034, April 6, 1970, 1970-7 C.C.H. Federal Income Tax, par. 6542.

[4] Petitioner argues (Pet. 25) that denying him probation was improper because the government did not prove that he was guilty of a criminal violation under Section 7203 of the Code, by not showing that he willfully failed to file his 1970 return. There is no requirement in a probation revoction proceeding, however, that criminal conduct be proven, but rather only that there be a reasonable showing that the conditions of probation have not been met. See *Burns* v. *United States*, *supra*. As indicated above, we think that that standard

peal following revocation of his probation, and was not considered or determined in the judgments of the court of appeals. In our view the probation conditions were entirely proper,[5] but, in any event, we do not think that petitioner should be able to complain of them now. See *United States* v. *Weber*, 437 F. 2d 1218 (C.A. 7), certiorari denied, 402 U.S. 1008; *Yates* v. *United States*, 308 F. 2d 737 (C.A. 10).

Nor is there any basis for the suggestion (Pet. 26) that petitioner's probation was revoked without an evidentiary hearing. A hearing was conducted by the district court both when revocation was urged and when petitioner sought reinstatement (see pp. 2-3, *supra*). This distinguishes the present case from the cases relied on by petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1971.

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[5] Contrary to petitioner's claim (Pet. 24), the requirement (R. 23a) that petitioner conduct himself "as a law-abiding, industrious citizen" sets a definite, intelligible standard and is almost identical to the condition which this Court upheld in *Burns* v. *United States*, *supra*.

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